

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

---

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

NERI MARROQUIN,

Defendant-Appellant.

---

UNPUBLISHED

September 25, 2003

No. 240821

Wayne Circuit Court

LC No. 00-010273-02

Before: Owens, P.J. and Griffen and Schuette, JJ.

PER CURIAM.

Defendant, Neri Marroquin, was convicted in Wayne circuit court by a jury of possession with intent to deliver over 650 grams of a mixture containing cocaine, MCL 333.7401(2)(a)(i). Defendant's claims that there was insufficient evidence to sustain his conviction and that the prosecutor engaged in prosecutorial misconduct are without merit. We affirm.

**I. FACTS**

This case stems from a search warrant executed by the Detroit police department at a home in Detroit on May 20, 2000. Before police executed the warrant, they had been conducting surveillance on the home for about one hour based on information that an individual named Doran Smith was engaged in illegal activities on the premises. Defendant was not named in the search warrant. At about 3:40 p.m., police observed a meeting between a man in the house (later identified as Doran Smith) and a man who drove up on a motorcycle. Believing that a drug transaction was taking place, the officer in charge ordered a raid on the house.

Officers testified that when they reached the screen door of the house they were able to see defendant seated at the dining room table chipping at a block of a substance they later discovered to be cocaine with a spoon. Police announced their presence and entered the house, defendant pushed a bag away from in front of him on the table and backed away from the table with his hands raised. On the table officers found a triple beam scale, which they testified is often used to weigh narcotics for later distribution. They also found that the bag defendant had pushed away contained what was later determined by lab analysis to be 116.42 grams of cocaine. The bag was less than one foot from defendant at the time of his arrest. Seated next to defendant was Kevin Smith who was rolling a marijuana cigarette as police entered.

On a chair next to the table where defendant was seated, police found a 9-millimeter pistol. A smaller bag, later determined by lab analysis to contain 2.89 grams of cocaine was also found on the dining room table. Inside the meat drawer of the refrigerator in the house, police found what was later determined by lab analysis to contain 922.30 grams of cocaine. Additional bags of what was later determined by lab analysis to be cocaine were found in the kitchen cupboard totaling 166.12 grams of cocaine. A large pot in the kitchen and a box in the kitchen were also found to contain 32.02 grams and 84.79 grams respectively of a substance later determined to be cocaine.

Police also found items used to package narcotics for sale including the triple beam scale, iron molds to crush the cocaine on a press, and painters' masks typically used to prevent the inhalation of cocaine when mixing. Additionally, police found \$5,130.00 in cash on Doran Smith. Based on the quantity of drugs and drug related paraphernalia, police testified that they believed that the house was used as a large scale cocaine distribution center where cocaine was given to street sellers for further circulation on the streets.

Defendant was charged with possession of a firearm during the commission of a felony, MCL 750.227b and was acquitted of this charge. He was also charged with felon in possession of a firearm, MCL 750.224f and the trial court directed a verdict of acquittal on this charge after the prosecutor failed to produce evidence that defendant was a convicted felon during the commission of this crime. Defendant was charged and convicted of possession with intent to deliver over 650 grams of a mixture containing cocaine, MCL 333.7401(2)(a)(i). He now appeals as of right.

## II. ANALYSIS

### A. Sufficiency of the Evidence

Defendant first argues that the evidence presented in this case was insufficient to allow the trier of fact to reasonably find that defendant knowingly possessed all 650 grams of cocaine. We disagree.

In reviewing the sufficiency of the evidence, this Court must view the evidence de novo in the light most favorable to the prosecutor and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999).

The concept of sufficiency of the evidence focuses on whether the evidence, taken as a whole, justifies submitting the case to the trier of fact or requires judgment as a matter of law. *People v Clark*, 172 Mich App 1, 6; 432 NW2d 173 (1988).

In a criminal case, due process requires that a prosecutor introduce evidence sufficient to justify a trier of fact in concluding that the defendant is guilty beyond a reasonable doubt. *Johnson, supra* at 723. This Court should not interfere with the jury's role of determining the weight of evidence or the credibility of witnesses. *People v Wolfe*, 440 Mich 508, 514; 489 NW2d 478 (1992). It is for the trier of fact rather than this Court to determine what inferences can be fairly drawn from the evidence and to determine the weight to be accorded to the inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). A prosecutor need

not negate every reasonable theory of innocence, but must only prove his own theory beyond a reasonable doubt in the face of whatever contradictory evidence the defendant provides. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

To sustain a conviction for possession with intent to deliver more than 650 grams of cocaine, the prosecution must prove (1) that the recovered substance was cocaine, (2) that the cocaine was in a mixture weighing more than 650 grams, (3) that defendant was not authorized to possess the substance, and (4) that defendant knowingly possessed the cocaine with the intent to deliver. *People v Wolfe*, 440 Mich 508, 516-517; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992); *People v Catanzarite*, 211 Mich App 573, 577; 536 NW2d 570 (1995).

The trial court in this case also instructed the jury on aiding and abetting. MCL 767.39 states:

Every person concerned in the commission of an offense, whether he directly commits the act constituting the offense or procures, counsels, aids, or abets in its commission may hereafter be prosecuted, indicted, tried and on conviction shall be punished as if he had directly committed such offense.

To establish that a defendant is guilty of aiding and abetting, the prosecution must show that the crime charged was in fact committed, that the defendant performed acts or gave encouragement that assisted the commission of the crime, and that the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time he gave aid and encouragement. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999).

Defendant argues that the prosecution failed to prove that defendant knowingly possessed the cocaine found by the police. "A person need not have actual physical possession of a controlled substance to be guilty of possessing it. Possession may be either actual or constructive." *Wolfe, supra* at 519-520. When determining whether the defendant constructively possessed the controlled substance, "the essential question is whether the defendant had dominion or control over the controlled substance." *People v Konrad*, 449 Mich 263, 271; 536 NW2d 517 (1995). "A person's presence, by itself, at a location where drugs are found is insufficient to prove constructive possession. Instead, some additional connection between the defendant and the contraband must be shown." *Wolfe, supra* at 520. Constructive possession exists when there is a sufficient nexus between the defendant and the contraband. *People v Johnson*, 466 Mich 491, 499-500; 647 NW2d 480 (2002). Generally, "a person has constructive possession if there is proximity to the article together with indicia of control." *People v Burgenmeyer*, 461 Mich 431, 438; 606 NW2d 645 (2000).

Here, defendant had more than 110 grams of cocaine in his hands at the time police entered the house. Next to him was a scale typically used for measuring quantities of drugs for purposes of making smaller packages for street sale. This evidence indicates that in addition to physically possessing over 100 grams of cocaine, he was assisting with the task of distributing very large amounts of cocaine. A jury could reasonably infer that although he was not directly in possession of the remainder of the drugs in the home, he was in constructive possession of those drugs or at the very least he was aiding and abetting in their possession and distribution.

We also note that the jury was instructed on the lesser included offense of possession with intent to deliver more than 50 but less than 224 grams of cocaine, MCL 333.7401(2)(a)(iii), but opted to convict defendant of the possession with intent to deliver over 650 grams of cocaine, MCL 333.7401(2)(a)(i).

When reviewing sufficiency of the evidence claims, courts should view all the evidence - whether direct or circumstantial - in a light most favorable to the prosecution to determine whether the prosecution sustained its burden. It is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences. *Hardiman, supra*, at 428. In short, the evidence in this case was sufficient to sustain defendant's conviction.

#### B. Prosecutorial Misconduct

Defendant next argues that the prosecutor committed prosecutorial misconduct when he charged defendant with felon in possession of a firearm (MCL 750.224f) but failed to present evidence that defendant was a felon. We disagree.

Defendant failed to object to this issue at trial. A criminal defendant may obtain relief based upon an unpreserved error if the error is plain and affected substantial rights in that it affected the outcome of the proceedings, and it either resulted in the conviction of an innocent person or seriously affected the fairness, integrity or public reputation of the proceedings. *People v Jones*, 468 Mich 345, 355-356; 662 NW2d 376 (2003).

Defendant was charged with felon in possession of a firearm because at the time of his arrest, he was on lifetime probation for a conviction of delivery of less than 50 grams of cocaine. When police executed their search warrant, they found a pistol near defendant. However, at trial, the prosecutor failed to obtain certified records that proved defendant was a convicted felon. The records would have been available late in the afternoon on the second day of the jury trial, but the trial court refused to grant a continuance and refused to take judicial notice of an uncertified computer printout, which showed defendant to be a felon. The prosecutor failed to prove the essential element of this crime, that defendant was a felon. As a result, the trial court directed a verdict of acquittal of the charge of felon in possession of a firearm.

Defendant now asserts that the prosecutor was acting in bad faith because he knew that he did not have adequate proof of defendant's felony conviction, yet made mention of defendant's status as a felon several times throughout the trial. Defendant asserts that the jury was tainted by the knowledge of his prior felony. The prosecutor mentioned only that defendant had been convicted of a prior felony; he never stated the nature of that felony.

This Court reviews claims of prosecutorial misconduct on a case-by-case basis, examining the pertinent portion of the record and evaluating the prosecutor's remarks in context to determine whether the defendant was denied a fair trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

Here, the prosecutor's repeated reference to defendant's past felony was not plain error. There is no evidence that the prosecutor acted in bad faith. During trial, he legitimately believed that he could obtain a conviction on this charge. Defendant was in fact a convicted felon and

evidence exists to support this fact. The prosecutor did attempt to obtain this information to present to the jury, yet the information did not arrive in a timely manner. The prosecutor may not have been as prepared for trial as he should have been, however this does not amount to prosecutorial misconduct. The proper remedy, which the trial court granted, for this lapse in preparation was a directed verdict of acquittal on the charge of felon in possession of a firearm.

Affirmed.

/s/ Donald S. Owens  
/s/ Richard Allen Griffin  
/s/ Bill Schuette